



# *COMMONWEALTH of VIRGINIA*

## *DEPARTMENT OF ENVIRONMENTAL QUALITY*

PIEDMONT REGIONAL OFFICE

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Molly Joseph Ward  
Secretary of Natural Resources

David K. Paylor  
Director

Michael P. Murphy  
Regional Director

### **STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO EUGENE E. COOKE FOR UNPERMITTED FILLING OF WETLANDS GLOUCESTER COUNTY, VIRGINIA**

#### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Eugene E. Cooke, regarding unpermitted filling of a stream and wetlands at property owned by Eugene E. Cooke in Gloucester County, Virginia, for the purpose of resolving certain violations of State Water Control Law and the applicable regulations.

#### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "Cooke" means Eugene E. Cooke, currently a resident of Chesterfield County Virginia. Cooke is a "person" within the meaning of Va. Code § 62.1-44.3.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
5. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
6. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
7. "E&S" means erosion and sedimentation.
8. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
9. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
10. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
11. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
12. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
13. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.
14. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
15. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge

or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

16. "PRO" means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.
17. "Property" or "Parcel" means the 3.14 acre tract of land located in Gloucester County, Virginia, off of Ware Point Road, State Route 665, Tax Map Number 34-234A, owned by Eugene E. Cooke and recorded in the Gloucester County Circuit Court Clerk's Office in Plat Book 25 page 776, ID Number 1102495.
18. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
19. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.
20. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
21. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
22. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
23. "USACE" means the United States Army Corps of Engineers.
24. "Va. Code" means the Code of Virginia (1950), as amended.
25. "VAC" means the Virginia Administrative Code.
26. "VWP" means Virginia Water Protection.
27. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

28. "Warning Letter" or "WL" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

**SECTION C: Findings of Fact and Conclusions of Law**

1. Cooke owns the Property in Gloucester County, Virginia.
2. On July 23, 2012, DEQ staff conducted an inspection at the Property in response to a complaint. DEQ staff inspected the Property for compliance with the requirements of State Water Control Law and Regulations. The DEQ inspector observed that 0.38 acres of emergent wetlands had been filled in order to construct a driveway, building pad and yard. Cooke did not have a permit for this activity.
3. Va. Code §62.1-44.15:20 (A) states, "[e]xcept in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.
4. 9 VAC 25-210-50 (A) states, "[e]xcept in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, withdraw surface water, otherwise alter the physical, chemical or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands or on or after October 1, 2001, conduct the following activities in a wetland: 1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 2. Filling or dumping; 3. Permanent flooding or impounding; or 4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.
5. On August 22, 2012, DEQ issued NOV No. 12-08-PRO-700 for the violations described in paragraph C (2).
6. On September 5, 2012, DEQ staff met with representatives of Cooke to discuss the violations.

7. On May 13, 2013, and October 13, 2013, DEQ staff met with representatives of Cooke to discuss the ongoing developments with the case.
8. On April 29, 2014, DEQ, USACE and representatives of Cooke inspected the Property and the adjacent property to discuss removal of the fill and restoration of the 0.38 acres of emergent wetlands on the Property.
9. On May 29, 2014, DEQ received a restoration plan for the Property.
10. Based on the results of the site inspections, and multiple meetings, the Board concludes that Cooke has violated Va. Code § 62.1-44.15:20(A) and 9 VAC 25-210-50(A) as described above.
11. In order for Cooke to return to compliance, DEQ staff and representatives of Cooke have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Cooke and Cooke agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$16,185.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

Cooke shall include his Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Cooke shall be liable for attorneys' fees of 30% of the amount outstanding.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of Cooke for good cause shown by Cooke, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Cooke admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Cooke consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Cooke declares he has received fair and due process under the Administrative Process Act and the State Water Control Law and they waive the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Cooke to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Cooke shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Cooke shall demonstrate that such circumstances were beyond his control and not due to a lack of good faith or diligence on his part. Cooke shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;

- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

- 9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
- 10. This Order shall become effective upon execution by both the Director or his designee and Cooke. Nevertheless, Cooke agrees to be bound by any compliance date which precedes the effective date of this Order.
- 11. This Order shall continue in effect until:
  - a. The Director or his designee terminates the Order after Cooke has completed all of the requirements of the Order;
  - b. Cooke petitions the Director or his designee to terminate the Order after they has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - c. The Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Cooke.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Cooke from his obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

- 12. Any plans, reports, schedules or specifications attached hereto or submitted by Cooke and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
- 13. Any documents to be submitted pursuant to this Order shall be submitted by Cooke or an authorized representative of Cooke.
- 14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

15. By his signature below, Cooke voluntarily agrees to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_.

\_\_\_\_\_  
Michael P. Murphy, Regional Director  
Department of Environmental Quality

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Eugene E. Cooke voluntarily agrees to the issuance of this Order.

Date: Oct 21 By: Eugene E Cooke  
Eugene E. Cooke

Commonwealth of Virginia

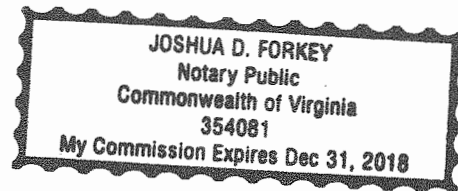
City/County of MENARD

The foregoing document was signed and acknowledged before me this 21 day of  
OCTOBER, 20 14, by EUGENE E. COOKE.

[Signature]  
Notary Public  
354081  
Registration No.

My commission expires: 12/31/2018

Notary seal:



## APPENDIX A

### SCHEDULE OF COMPLIANCE

Cooke agrees to the following:

1. Within 60 days of the effective date of this Order, Cooke shall submit to DEQ for review and approval the final version of the wetland restoration plan, detailing the methods and project goals for wetland restoration and monitoring of the wetlands labeled on page C2.0 and C2.1 on the plans entitled "Cooke Residence Permit Plans" submitted to DEQ on May 29, 2014. The final restoration plan shall include a schedule for completion of the restoration plan. Any changes to the approved final restoration plan shall not be made or implemented without written advance notice to and approval by DEQ. If after submittal and approval of the final restoration plan, Cooke believes additional time is reasonably necessary to complete the final restoration plan, Cooke may make a written request for additional time to complete the final restoration plan, and if DEQ approves such request, the approval shall be incorporated into this order pursuant to paragraph E (12).
2. Cooke shall notify DEQ in writing at least 10 days prior to the date that work under the final restoration plan is to begin.
3. Cooke shall monitor the restored wetlands in accordance with the final restoration plan. Monitoring reports shall be prepared in accordance with the approved final restoration plan and shall be submitted no later than December 31<sup>st</sup> of each year.
  - a. If the restored wetlands fail to meet the success criteria specified in the approved final restoration plan, as determined by DEQ or Cooke, at any time during the monitoring period, or if visual observations conclude that the Property is not progressing towards the overall restoration goals, the reasons for this failure shall be identified by Cooke. In addition, an alternative restoration plan and monitoring plan shall be submitted to DEQ for review and approval with that year's monitoring report or within 60 days of the determination that success criteria are not being met, whichever occurs first. The DEQ approved alternative restoration plan and monitoring plan shall be implemented by Cooke in accordance with a DEQ approved schedule.
  - b. If the restored wetlands fail to meet all success criteria by the end of the last monitoring year and Cooke's or DEQ's analysis indicates that corrective action cannot sufficiently address the reasons for such failure, Cooke shall submit to DEQ for review and approval within 60 days of such determination, an alternate mitigation plan and schedule for the unsuccessfully restored wetlands. The proposed mitigation plan shall conform to the applicable provisions of Va. Code § 62.1-44.15:21 and 9 VAC 25-210-116 and shall be implemented upon DEQ's approval. If the purchase of mitigation bank credits or contribution to an in-lieu

fee fund is proposed, the proof of purchase or contribution shall be submitted to DEQ within 30 days of DEQ's approval of the alternate mitigation plan approval.

4. Unless otherwise specified in this Order, Cooke shall submit all requirements of Appendix A of this Order to:

Gina Pisoni  
Enforcement Specialist  
VA DEQ – Piedmont Regional Office  
4949-A Cox Road  
Glen Allen, Virginia 23060  
804-527-5156  
804-527-5106 (fax)  
[Gina.Pisoni@deq.virginia.gov](mailto:Gina.Pisoni@deq.virginia.gov)